

FIRST DIVISION
December 30, 2011

No. 1-09-0226

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
)	
v.)	No. 01 CR 9864
)	
)	
RUFUS FOREMAN,)	Honorable
)	James M. Obbish,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

ORDER

Held: The State did not violate defendant's rights under *Doyle v. Ohio*, 426 U.S. 610 (1976). The trial judge did not err by refusing to specifically answer a note the jury sent the judge during jury deliberations. The defendant was not denied a fair trial because of comments made by the prosecutor during opening and closing arguments. And defense trial counsel was not ineffective.

¶ 1 Following a jury trial, defendant Rufus Foreman was found guilty of first-degree murder based on a felony murder charge and aggravated kidnapping in the shooting death of Ms. Wardella Winchester. Defendant was part of a group of individuals who kidnapped and subsequently murdered Ms. Winchester as part of a scheme to locate and catch her son who had stolen drugs and money from defendant's codefendant brother. The trial court determined that defendant was eligible for the death penalty because he had previously been convicted of first-degree murder in a prior unrelated case. Defendant was sentenced to natural life imprisonment without the possibility of parole.

¶ 2 Defendant contends on appeal that: (1) his constitutional rights to a fair trial, due process of law, and against self-incrimination were violated when the State improperly commented on his post-arrest silence in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976); (2) the trial judge erred by failing to respond to a note the jury sent the judge during jury deliberations; (3) he was denied a fair trial because of comments made by the prosecutor during opening and closing arguments; and (4) his trial counsel was ineffective. We affirm.

¶ 3 ANALYSIS

¶ 4 Defendant first contends that his constitutional rights to a fair trial, due process of law, and against self-incrimination were violated when the State improperly commented on his post-arrest silence in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976). We disagree.

¶ 5 *Doyle* involved the consolidated cases of two defendants who, at separate trials, each took the stand and gave an exculpatory story which had not previously been told to arresting officers or other law enforcement authorities. Over defense counsels' objections, defendants were cross-

examined as to why they had not given the arresting officers the same exculpatory explanations they were now giving at trial.

¶ 6 In reversing defendants' convictions, the United States Supreme Court held that a defendant who offers an exculpatory statement for the first time at trial may not be cross-examined on his failure to have given such a statement to law enforcement authorities after having received *Miranda* warnings and chosen to remain silent. *Doyle*, 426 U.S. at 619-20. The rationale for the Court's decision was that a defendant's decision to remain silent and not offer a post-*Miranda* exculpatory statement to police may not necessarily indicate that such a statement, given for the first time at trial, was recently fabricated, but rather, may indicate defendant's exercise of his *Miranda* rights. The Court reasoned that a defendant's silence following the recitation of *Miranda* warnings is always "insolubly ambiguous" since such silence may be nothing more than the accused's exercise of his *Miranda* rights. *Doyle*, 426 U.S. at 617. The Court found that under such circumstances it would be fundamentally unfair and a deprivation of due process to allow a defendant's post-*Miranda* silence to be used to impeach his exculpatory statement offered for the first time at trial.

¶ 7 The testimony defendant challenges here was elicited during direct examination of Assistant State's Attorney (ASA) Tisa Morris, where she described her interview with defendant:

"Q. [Assistant State's Attorney]: When [defendant] told you that they were discussing what to do with the victim, did you ask him any questions?

A. [ASA Morris]: Yes.

Q. What specifically did you ask him?

A. I asked him if they were talking about killing her.

Q. What was his response?

A. He didn't want to talk to me any more.

Q. When he decided – told you he didn't want to discuss the killing, did you offer him anything?

A. Yes. After it was clear to me that he didn't want to talk about it anymore, I said well based on what you've told me now what we can do is let it remain an oral with notes that I have taken or I gave him some other options of how we could preserve his statement."

¶ 8 Defendant claims that the State improperly used his refusal to answer ASA Morris' question to imply to the jury that he was guilty of murder. Initially we find that defendant waived this argument. Defendant did not object to either the testimony regarding his oral statement or to the prosecutor's closing argument and he failed to include both issues in his motion for a new trial. *People v. Enoch*, 122 Ill.2d 176, 186 (1988) (issues not raised at trial and included in a posttrial motion are waived for purposes of review); *People v. Graham*, 206 Ill. 2d 465, 475 (2003) (defendant's argument concerning alleged *Doyle* violation waived). Waiver aside, we do not believe that the holding in *Doyle* applies to the facts in this case.

¶ 9 Defendant did not remain silent after he was taken into custody and read his *Miranda* rights, and his subsequent refusal to answer the question at issue was not an invocation of his right to remain silent. See *People v. Rickard*, 99 Ill. App. 3d 914, 917 (1981) (suspect's response "I won't tell you" was not an invocation of his right to remain silent); *People v. Landgham*, 182

No. 1-09-0226

Ill. App. 3d 148, 158 (1989) (suspect was not invoking his right to remain silent when he declined to answer question and instead stated "I won't tell you"). In the instant case, "defendant's silence was not induced by *Miranda* warnings but, rather, was induced by a difficult question he received some time after expressly waiving his *Miranda* rights. Thus, the rationale underlying *Doyle* does not extend to these circumstances." *People v. King*, 384 Ill. App. 3d 601, 610 (2008).

¶ 10 For the same reasons, we reject defendant's argument that the prosecutor's comments during rebuttal closing argument referring to defendant's refusal to answer the question at issue denigrated his right to remain silent or that defense counsel's failure to object to the comments amounted to ineffective assistance of counsel.

¶ 11 Defendant next contends that the trial judge erred by failing to answer a jury note asking for clarification of a phrase in the jury instruction on felony murder. In regard to the felony murder charge, the jury had been instructed that they needed to find "that the defendant, or one whose conduct he is legally responsible, performed the acts which caused the death [of the victim]." During its deliberations, the jury sent a note to the judge asking for clarification of the phrase "performed the acts." Defendant argues that the jury's question was crucial because there was no evidence as to how the murder was carried out or who actually committed the murder.

¶ 12 After receiving the jury note, the trial judge asked for input from both sides. Both sides then agreed that the jury should be instructed that they had received all the evidence and law and that they should continue to deliberate. The trial judge then gave the instruction.

¶ 13 We do not believe the trial judge abused his discretion in this regard. Where a defendant

No. 1-09-0226

acquiesces in a trial judge's answer to a jury's question, defendant cannot later complain that the judge abused his discretion. *People v. Reid*, 136 Ill. 2d 27, 38 (1990). Moreover, defense trial counsel's acquiescence did not amount to ineffective assistance as no prejudice resulted from the acquiescence.

¶ 14 The jury received a full and complete set of instructions on the applicable law. The jury was given Illinois Pattern Jury Instructions, Criminal, Nos. 7.01, 7.02 (4th ed. 2000), which described the definition of and issues involved in the charge of felony murder with the predicate felony of aggravated kidnapping. The jury also received Illinois Pattern Jury Instruction, Criminal, No. 5.03 (4th ed. 2000), defining accountability.

¶ 15 In addition, the phrase "performed the acts" was not central to the defendant's theory of the case. Defendant was charged with felony murder on an accountability theory. Defendant's theory of the case was that he was not at all involved in the kidnapping and subsequent murder of the victim, not that he simply did not "perform the acts" that caused her death.

¶ 16 Defendant next contends he was denied a fair trial due to inflammatory statements the prosecutors made during opening and closing arguments. Again, we must disagree.

¶ 17 The character and scope of an attorney's opening and closing arguments are generally left to the discretion of the trial court. *People v. Deloney*, 359 Ill. App. 3d 458, 470 (2005).

Prosecutors are afforded wide latitude in their arguments and may comment upon the presented evidence and enunciate reasonable inferences arising therefrom even if those inferences are unfavorable to the defendant. *Deloney*, 359 Ill. App. 3d at 470.

¶ 18 A reviewing court will not reverse a jury's verdict on the basis of improper remarks unless

the remarks resulted in substantial prejudice to the defendant and constituted a material factor in his conviction. *People v. Alvine*, 173 Ill. 2d 273, 292-93 (1996). Whether a prosecutor's comments and remarks constitute prejudicial error is evaluated according to the language used, its relation to the evidence, and the effect of the argument on the rights of the defendant to a fair and impartial trial. *People v. Coleman*, 201 Ill. App. 3d 803, 807 (1990). Although the appropriate standard of review on this issue is unsettled (see *People v. Maldonado*, 402 Ill. App. 3d 411, 421-22 (2010)), we find that under either standard, *de novo* or abuse of discretion, there was no reversible error.

¶ 19 In the instant case, defendant challenges a comment made by the prosecutor during opening argument describing defendant and his codefendants as "animals." Defendant also challenges the following comment made by the prosecutor during closing argument describing the backgrounds of some of the witnesses who were allegedly involved in the illegal drug trade: "There is an old saying and please just accept this for the saying, when you go after the devil, you have to go to hell to get your witnesses." Defendant contends that the reference to the "devil" was a personal attack. Defendant also complains that he was prejudiced by the prosecutor's closing rebuttal argument referring to him as a cowardly thug.

¶ 20 We note that defendant did not object to these comments at trial and he failed to raise any question concerning them in his post-trial motion. Therefore, any alleged error is waived. *People v. Sambo*, 197 Ill. App. 3d 574, 586 (1990).

¶ 21 Waiver aside, we find that the prosecutor's comments and remarks did not deprive defendant of a fair trial. The evidence revealed that the defendant and his codefendants laid in

wait for the victim and then, armed with guns and wearing ski masks, attacked her, threw her to the ground and bound and gagged her with duct tape before tossing her into the trunk of a car. She remained there until they fired a gunshot into her head and discarded her body in a garbage receptacle.

¶ 22 While we do not condone the use of such pejorative terms as "animal," "devil," or "cowardly thug," in describing defendant and his actions, we do not find that it rises to the level of reversible error given the nature and brutality of the crime. See *People v. Green*, 118 Ill. App. 3d 227, 236 (1983) (referring to defendant as an "animal" and the "lowest form of human being" held not improper in light of brutality of crime); *People v. Wilson*, 254 Ill. App. 3d 1020, 1057 (1993) (referring to defendant as an "animal" and a "coward" held not improper); and *People v. Zoph*, 381 Ill. App. 3d 435, 458 (2008) (characterizing defendant as demonic justified in light of brutality of crime). Moreover, any potential prejudice to the defendant was lessened where the trial court admonished the jury that opening and closing statements are not evidence. *People v. Chavez*, 265 Ill. App. 3d 451, 462 (1994). For these same reasons, we cannot conclude that trial counsel provided ineffective assistance by failing to object to the prosecutor's comments and remarks.

¶ 23 Defendant finally contends that the prosecutor made statements during rebuttal closing argument that were not based upon facts adduced at trial but were designed to suggest that witness Mark Prude gave testimony contrary to his videotaped statement implicating defendant in the crime because Prude was fearful of defendant. Defendant points to the following statement by the prosecutor to support his contention:

"Mark Prude has a motive to lie when he comes in here and it's this: He was sentenced to 20 years on this case, plus he got time for an aggravated battery of a correctional officer. When he left here in his yellow IDOC jumpsuit, he going [sic] downstate to the penitentiary to finish out his time for what he did here. When he goes there, he will be housed with violent criminals, people who may not take a liking to the fact that he testified in a murder trial. He has a self-preservation interest. But it's not us he is afraid of. We can't do a whole lot to him. He testified the way he did so that he can go back and tell the guys on the tier, I didn't go after Rufus; I stood tall."

¶ 24 Defendant claims that the prosecutor's arguments suggested to the jury that Mark Prude was under threat from violent criminals who would harm him at the behest of the defendant if he testified against defendant. We must disagree.

¶ 25 The prosecutor's arguments, read in context, suggested to the jury that Mark Prude was protecting himself in a prison culture that looked down on inmates who testified against other defendants or implicated other individuals in a crime. See *People v. Johnson*, 385 Ill. App. 3d 585, 605 (2008) (prosecutor's closing argument did not suggest intimidation by defendant but rather that the witness was afraid of what might happen to him in jail as result of cooperating with the authorities). In addition, the prosecutor's arguments were a proper response to defense trial counsel's suggestion that Mark Prude had fabricated his videotaped statement.

¶ 26 For these same reasons, we reject defendant's final contentions that defense trial counsel was ineffective for failing to object to the prosecutor's comments or that the cumulative effect of the alleged errors denied him a fair trial.

No. 1-09-0226

¶ 27 Accordingly, we affirm the judgment of the trial court.

¶ 28 Affirmed.